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No. 88-346

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

ANTHONY MINIZZA, *et al.*,
Petitioners,

v.

STONE CONTAINER CORP. CORRUGATED CONTAINER DIV. EAST PLANT, *et al.*,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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COUNTERSTATEMENT OF QUESTIONS PRESENTED FOR REVIEW

Did the Court of Appeals err in concluding as a matter of law that up-front lump sum payments made to employees to induce their ratification of a collective bargaining agreement were not compensation for hours of employment within the meaning of Section 7(e)(2) of the Fair Labor Standards Act, (the "FLSA"), 29 U.S.C. § 207(e)(2)?

(a) Was that holding a correct conclusion of law based on the District Court's factual findings and undisputed testimony about the purpose of the payments and the eligibility conditions attached thereto?

(b) Did the Court of Appeals err in adopting a statutory interpretation of § 7(e)(2) which was consistent with that previously rendered by the Department of Labor?

PARTIES TO THE PROCEEDING

The Respondents in this case are Stone Container Corporation, Corrugated Container Division (East Plant), a Division of Stone Container Corporation; Stone Container Corporation (West Plant); Chesapeake Corrugated Container Division, a Division of Chesapeake Corporation; and Owens-Illinois, Inc. There are no parent, subsidiary or affiliated corporations except as set forth herein.

Petitioners in this case, all individuals, are current or former employees of the Respondent employers.

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COUNTERSTATEMENT OF THE CASE

Respondents (referred to hereafter as the "employers") adopt the introduction and fact sections of the decision of the Court of Appeals, which are reprinted in the Appendix filed by Petitioners at 3a-6a.[1] Set forth below is a brief Counterstatement of the Case which addresses certain inaccuracies in, and omissions from, the Statement of the Case advanced by petitioners (referred to hereafter as "plaintiffs").

In their Statement of the Case, plaintiffs describe the lump sum payments and eligibility conditions without discussing the purpose of the eligibility conditions. Plaintiffs note correctly that the lump sum payments were adopted in lieu of wage increases, for the purpose

1. References to "App." are to the Appendix filed with the Petition for a Writ of *Certiorari*. References to "JA" are to the Joint Appendix filed with the Court of Appeals.

of inducing ratification of the collective bargaining agreement. They fail to acknowledge, however, that there was no specific finding by the District Court that the payments were given in exchange for services actually rendered. The District Court's conclusion that the payments were compensation for employment was stated in the Conclusions of Law, rather than the Findings of Fact. (App. at 27a-31a). In rejecting that legal conclusion, the Court of Appeals did not disturb the District Court's Findings of Fact. Indeed, plaintiffs do not point to a single *factual* conclusion by the District Court which was disregarded or rejected by the Court of Appeals.

The Court of Appeals pointed to undisputed testimony from the trial record that the eligibility conditions underlying the lump sum payments were intended simply as a cost-saving device. The United Paperworkers International Union Local 375 ("the Union") originally wanted lump sum payments to be made to all employees on the seniority list, without regard to length of service. The employers recognized however, that they could obtain the ratification of the collective bargaining agreement without making payments to so many individuals. In targeting the lump sum payments to active employees with minimum periods of service, the employers were not rewarding services rendered under the expired collective bargaining agreements. On the contrary, they agreed to make payments to those individuals who were perceived as most likely to participate in the ratification process, and who might otherwise be inclined to vote against the contracts. (App. at 12a; JA at 511-14).

SUMMARY OF REASONS FOR DENIAL OF WRIT

Plaintiffs ask this Court to rule *per se* that lump sum payments made to induce ratification of a collective bargaining agreement must be included in the "regular rate" of compensation in calculating overtime pay under the FLSA. Plaintiffs' argument is presented in a case of first impression. Thus, plaintiffs do not even suggest that a writ of *certiorari* would be appropriate under Rule 17.1(a) of the Supreme Court Rules of Procedure, which provides for review of a decision in clear conflict with that of another federal appellate court. Presumably, therefore, review is sought under Rule 17.1(c), on the ground that the case presents an important question of federal law which has not been, but should be, settled by this Court.

The instant case is inappropriate for *certiorari* jurisdiction for two reasons. First, the Court of Appeals correctly interpreted the FLSA based on the factual findings and records developed by the District Court. Section 7(e)(2) of the FLSA clearly permitted the defendant employers to exclude the lump sum payments from the regular rate of compensation in calculating overtime pay, at least in the specific factual context presented at trial.

Second, while the Court of Appeals reversed a sweeping and erroneous legal conclusion by the District Court, its holding was specifically limited to "the facts of the particular case." (App. at 14a). As the Department of Labor has recognized, "there is so much variation in the form of these bonuses" that compliance with the FLSA is better achieved through litigation, rather than a hasty or overbroad interpretation of the statutory provision at issue. Until other District and Circuit Courts address the issue in its varied contexts, a request for review by this Court is premature.

REASONS FOR DENIAL OF WRIT

A. Certiorari Should Be Denied Because The Decision Of The Court Of Appeals Below Was Plainly Correct As A Matter Of Law.

The FLSA requires that an employee who works more than forty hours in one week be paid an overtime rate of not less than "one and one-half times the regular rate at which he is employed." 29 U.S.C. § 207(a)(2). The "regular rate" at which an employee is paid is defined in § 7(e) of the FLSA as "all remuneration for employment paid to, or on behalf of, the employee." The "regular rate" is defined specifically to exclude seven categories of payments, including gifts, vacation and holiday pay, contributions to health and welfare plans, discretionary bonuses and premium pay for excess hours worked. Among the statutory exclusions from the "regular rate" are:

> [P]ayments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and other similar payments to an employee *which are not made as compensation for his hours of employment*.

29 U.S.C. § 207(e)(2) (emphasis added).

The payments at issue in this case were not "compensation for hours of employment" within the plain meaning of § 7(e)(2). Significantly, the bonuses were paid at the beginning of the contract years in question. An employee who received a lump sum payment was not required to work even one more day. An employee who quit, retired, was terminated or went on sick leave the day after a lump sum payment was made was under no

obligation whatsoever to refund all or even part of the payment. (JA 442, 531). The payment was his to keep, a reward for his having been a member of a bargaining unit that ratified a contract providing for wage freezes and benefit concessions.

Likewise, the lump sum payments were not compensation for past hours of employment. (JA 444). Indeed, it would be absurd to suggest that the employers agreed to new contracts which provided for compensation for services rendered by employees under the old, expired contracts. In fact, an employee who quit the day before the lump sum payments were made was entitled to no part of the bonus. (JA 442-44).

Plaintiffs' challenge to this analysis is fourfold. First, plaintiffs argue that the lump sum payments were compensation for services rendered, as evidenced by eligibility conditions attached to the payment of the bonuses. Second, they argue that the Court of Appeals erroneously required a link between lump sum payments and specific numbers of hours of service as a precondition to the inclusion of the payments in the "regular rate" of compensation. Third, in arguing for a *per se* rule that has been rejected already by the Department of Labor, plaintiffs point to a purported dissimilarity between collectively-bargained lump sum payments and the examples of excludable compensation set forth in § 7(e)(2) of the FLSA. Finally, plaintiffs look to public policy considerations. Each of these arguments advanced by plaintiffs is erroneous.

1. The Lump Sum Payments Were Not Compensation For Services Rendered.

The District Court concluded, and the Court of Appeals agreed, that the lump sum payments were negotiated in lieu of wage increases to induce the ratification of a collective bargaining agreement. (App. at 5a, 26a). Plaintiffs argue that because the lump sum

payments were made in lieu of wage increases, they must be treated similarly to future wages in calculating overtime pay. Simultaneously, they point to the eligibility conditions in suggesting that lump sum payments were linked to past service.

These contentions are inconsistent. On the one hand, plaintiffs analogize the payments to wages, which are payments for *future* services rendered. On the other hand, they point to eligibility conditions based on *past* services rendered. Plaintiffs fail to recognize this anomaly.

The logical explanation is that the payments were neither compensation for past services nor compensation for future services. The up-front, lump sum payments were fundamentally different from wages.[2] Collectively-bargained agreements to pay wages are intended not only to secure ratification of a contract, but to compensate an employee for each hour or unit of time worked. The *quid pro quo* is wages for services rendered.

The lump sum payments in the instant case, by contrast, were not rewards for services rendered, but benefits paid to members of a bargaining unit which voted to approve the contract. The employers could have provided any number of benefits to achieve that purpose, including additional vacation time or pay, pension contributions, health and welfare benefits or profit sharing plans. Instead, they agreed to pay cash. The *form* of the benefit provided did not transform the benefit into compensation for hours of employment.

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2. The up-front, lump sum payments at issue in this case also differ from bonuses paid at the *end* of a stated period as compensation for services performed. Such end-of-year bonuses are clearly compensation for hours of employment, as recognized by the Department of Labor in its regulations, 29 C.F.R. § 778.209(b) (1987). The lump sum payments, by contrast, were made at the beginning of the years in question, without any requirement of future service.

Plaintiffs misconstrue the nature of the holding below in arguing that the Court of Appeals reversed a finding of fact in concluding that the lump sum payments in this case were not compensation for employment. The District Court, focusing in part on the eligibility conditions, stated in its Conclusions of Law that:

> While not tied directly to hours worked, the correlation in the eligibility provisions between work and bonus receipt supports the conclusion that the bonuses were compensation for employment. Employees who were not active — on long term disability or laid off — during the three months prior to the first year bonus date would not receive the full bonus; for the second year bonus, employees had to be active for the six months prior to the bonus date to receive the full bonus. If non-active employees returned to active employment within twelve months of the bonus date, they would receive a pro rata share of the bonus applicable to that year.

(App. at 29a). Thus, the District Court rendered a legal conclusion that the payments were compensation for employment.

In reversing that legal conclusion, the Court of Appeals did not disturb the District Court's Findings of Fact. Instead, it reached a different conclusion of law based on the District Court's factual findings and the record on appeal. The Court of Appeals concluded that:

> [T]he fact that the entitlement to these payments was dependent on an employee's having been with the employer for a certain period of time preceding the payment *does not support the conclusion that the payments were compensation for employment*. A review of the eligibility terms reflects a requirement only that a payee achieve the status of an active employee for a specified period of time prior to receipt. It does not matter how many hours an

> employee worked during that period, nor how many hours he might work in the future. The employee could even terminate his employment immediately upon receiving the payment and retain the payment.
>
> Furthermore, *the undisputed testimony reflects that the eligibility requirements were included solely to hold down the employer's costs.* [JA at 510-11]. As the employers note, all the employees could have been made eligible for the bonus. However, this alternative would have cost the employers more than if they were able to exclude some of the employees, as the employers chose to do. Ironically, if the employers had paid the lump sum to all employees there could be no argument that the eligibility conditions were tied to compensation for hours of employment as there then would be requirements. In that case, the attention would be focused solely on the character of the payments, which we believe to be the key inquiry in this case. . . . *We see no reason why we should come to a different conclusion where the evidence reflects that requirements were imposed solely for reasons of cost containment, and were not an attempt to tie payments to compensation for services rendered.*

(App. at 9a) (emphasis added). The Court of Appeals applied the law to the facts, without altering a single factual finding of the District Court. Indeed, the question of whether the lump sum payments were compensation for hours of employment was the ultimate legal issue in this case.

2. The Court Of Appeals Did Not Require A Precise Calibration Or Link Between Specific Hours Of Service And The Amount Of The Lump Sum Payment.

In holding that the lump sum payments in this case were properly excluded from the regular rate of compensation, the Court of Appeals concluded that they were

"not payments relating to hours of employment or service." (App. at 12a). The precise statutory language of § 7(e)(2) excludes from the regular rate of compensation "other similar payments to an employee . . . not made as compensation for his hours of employment."

According to plaintiffs, the Court of Appeals misread § 7(e)(2). Plaintiffs argue that:

> As read by the court of appeals . . . § 7(e)(2) exempts from the "regular rate" for overtime purposes any payments made by an employer to an employee not measured by a *precise* number of hours or amount of service.

(Cert. Petition at 11) (emphasis in original).

That characterization of the Court of Appeals' decision is erroneous. The Court did not base its decision on the absence of a calibration or formula. Instead, it recognized that the statute required *some nexus* between services and compensation paid, and that there was no such link whatsoever in this case. That holding is consistent with the statutory language, which speaks of compensation for *hours* of employment. That does not mean that the hours must be quantifiable in direct relation to the payment; it means simply that there must be *some* hours worked or services performed as a *quid pro quo* for the payment. In this case, there was no evidence whatsoever to establish that the lump sum payments were intended to be rewards for services rendered.[3]

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3. This is not the only example of employee compensation or remuneration which is attributable to employment status, rather than specific services performed. For example, a signing bonus may be paid to an employee at the commencement of employment, without any requirement of a refund if the employee quits shortly thereafter. Similarly, pension contributions, health and welfare benefits and other forms of compensation may be provided to employees on sick leave or layoff, even though no services are performed as a basis for the benefits. In those instances, (cont.)

3. The Exclusion Of The Lump Sum Payments Was Consistent With The "Other Similar Payments" Language In Section 7(e)(2).

Plaintiffs argue that the lump sum payments were not similar to the other forms of excludable compensation identified in § 7(e)(2). The pertinent statutory language permits the exclusion of

> payments made for occasional periods when no work is performed due to vacation, holiday, illness, failure of the employer to provide sufficient work, or other similar cause; reasonable payments for traveling expenses, or other expenses, incurred by an employee in the furtherance of his employer's interests and properly reimbursable by the employer; and *other similar payments to an employee which are not made as compensation for his hours of employment . . .*

29 U.S.C. § 7(e)(2) (emphasis added). The Department of Labor's interpretive regulations state that such payments must be " 'similar' in character to the payments specifically described in section 7(e)(2)." 29 C.F.R. § 778.224(a) (1987).

In the context of pure statutory interpretation, the District Court concluded that the lump sum payments were not "similar" to payments for idle hours or reimbursements for expenses, which constitute the first two of the three enumerated categories in Section 7(e)(2). (App. at 30a). The Court of Appeals reversed, concluding that the payments were "similar in character" insofar as "they are not payments relating to hours of employment or service." (App. at 12a). The Court of Appeals added that such a conclusion was mandated by the plain statutory language of § 7(e)(2), which contains

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(Continued)
payments are made in reward for employment status, not as compensation for services rendered.

three separate clauses, each of which must be read independently:

> The phrase "other similar payments . . . not made as compensation for hours of employment" does not mean just other payment for idle hours or reimbursements, the two types of payments set forth in the two preceding clauses of the section, but payments not tied to hours of compensation, of which payments for idle hours and reimbursements are only two examples. This interpretation gives independent meaning to the third clause. Indeed, it makes little sense to read the third clause as only an embellishment of the first two, since those two clauses contain "other similar" language as well.

(App. at 11a-12a) (footnote omitted).

The Court of Appeals' statutory interpretation is also supported by the Department of Labor's opinions on the issue. In an October 15, 1981 Opinion Letter (JA at 25-26), the Department of Labor concluded that up-front, lump sum payments which were collectively bargained in lieu of increases of wages were properly excluded from the regular rate of compensation under § 7(e)(2). Obviously, the Department of Labor did not consider the "other similar payments" language of § 7(e)(2) to be a bar to the exclusion of lump sum payments from the regular rate. Thus, while there may be a dispute as to how the Department of Labor would apply § 7(e)(2) to the facts of any particular case, there can be no dispute about the Department's position on the interpretation of the "other similar payments" language in the statute and the regulations.

This interpretation by the Department of Labor is entitled to "respect." *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944):

> We consider that the rulings, interpretations and opinions of the [wage and hour] Administrator under this Act, while not controlling upon the courts by reason of their authority, do constitute a body of experience and informed judgment to which courts and litigants may properly resort for guidance.

Id. Indeed, at issue here is not only the statute, but the administrative regulations interpreting § 7(e)(2).[4] As the Court held in *Udall v. Tallman*, 380 U.S. 1, 16 (1965), even greater deference is required "[w]hen the construction of an administrative regulation rather than a statute is in issue":

> Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt . . . [T]he ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation.

Id. at 16-17 (quoting from *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945)). Plaintiffs, like the District Court below, fail to give proper deference to the Department of Labor's interpretation of its own regulations.

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4. Plaintiffs rely heavily on the Department of Labor's interpretation of the "other similar payments" provision in § 7(e)(2). Plaintiffs cite 29 C.F.R. § 778.224(a), which is cited and discussed above, arguing that this Court should recognize "[t]hese codified interpretative rulings of the Department of Labor." (Cert. Petition at 14). It is curious that plaintiffs cite the regulations without addressing the Department of Labor's 1981 Opinion Letter which, by implication, sheds considerable light on the regulation in question.

4. Public Policy Supports The Exclusion Of The Lump Sum Payments From The Regular Rate Of Compensation.

Plaintiffs point to the prevalence of lump sum payments in collective bargaining in recent years, arguing that public policy supports the inclusion of such payments in the regular rate of compensation when calculating overtime pay. The Court of Appeals disagreed, finding that public policy supported the opposite result. While limiting its holding to the facts of this case, the court noted that:

> The FLSA was not intended to emasculate the ability of labor and management to be creative in resolving labor disputes in a manner which is mutually beneficial from an economic standpoint to all parties involved in such negotiations. The FLSA should not be used in this case as an impediment to creative and innovative collective bargaining which brings labor peace.

(App. at 14a). That position is consistent with the evidence developed at trial, which showed that the Union and the employers agreed to the lump sum payments — with the understanding that such payments would not be included in the regular rate in calculating overtime pay — for the specific purpose of inducing the ratification of an overall labor package which otherwise would have been less attractive to employees. Such creativity and innovation achieved precisely the beneficial result described by the Court of Appeals.

Contrary to plaintiffs' arguments, there is no policy which mandates the inclusion of the lump sum payments in the regular rate of compensation. Lump sum payments are simply a form of benefit, like holiday pay,

vacation pay and other fringe benefits, all of which are expressly excluded from the regular rate under § 7(e)(2) of the FLSA.

Plaintiffs' predictions of draconian ramifications are illogical and unreasonable. Plaintiffs point to no evidence or statistics to support their bold assertion that "[t]he result would be to encourage employers to work employees longer hours; to limit the compensation employees receive for the inconveniences and wear and tear of overtime work; and to discourage, rather than encourage, the spreading of work among more employees." (Cert. Petition at 9). Certainly, the Department of Labor disagrees, as evidenced by its refusal to adopt a *per se* rule of the kind advocated by plaintiffs. (*See* DOL Opinion Letter dated April 21, 1986, JA at 34-36).

It is important to emphasize, moreover, that the use of lump sum payments to induce the ratification of a collective bargaining agreement is obviously favored by employers and unions throughout the country. Indeed, the popularity of lump sum payments among employees and unions may be attributable in part to a trade-off which results in a definite benefit for employees, and a potential detriment to employers. In foregoing a relatively modest adjustment to overtime pay, an employee who receives an up-front lump sum payment obtains a substantial cash benefit. Even if the employee fails to work another day, whether because of resignation, termination, layoff, illness, plant closing or any other reason, he may keep that payment. This scenario does not lend itself to any wholesale evisceration of the existing wage scale. Employers would undoubtedly be reluctant to engage in a substantial reclassification of compensation from wages to up-front, lump sum payments, in view of the risk that they might not get any services in exchange for the payments made.

Thus, there are strong incentives for unions and employers to limit lump sum payments to the extent necessary to induce ratification of a collective bargaining

agreement, without disrupting the economic status quo. The predictions and ruminations of plaintiffs, therefore, should not detract from the statutory analysis set forth by the Court of Appeals.

B. The Exercise Of Certiorari Jurisdiction In This Case Of First Impression Would Be Premature.

In view of the prevalence of lump sum payments in collective bargaining in recent years, the issue of FLSA treatment in calculating overtime pay is, admittedly, an important one. What was particularly troublesome about the District Court's opinion was not that it ruled against the employers in this relatively small case, but that it adopted a *per se* rule which purported to require the inclusion in the regular rate of *all* up-front lump sum payments made as a result of collective bargaining.

The Court of Appeals was more careful in its crafting of a holding that was limited to the facts of this case. By necessity, the decision turned in part on questions of statutory construction, such as an interpretation of the "other similar payments" language of § 7(e)(2). The decision was also based, however, on the specific language of the collective bargaining agreements as well as testimonial evidence about the bargaining history underlying the lump sum payments. From these facts, the Court of Appeals concluded that the lump sum payments were not compensation for hours of employment within the meaning of § 7(e)(2). The Court cautioned that:

> We do not address whether all such payments are or are not excludable; that finding depends on the facts of the particular case.

(App. at 14a).

The Department of Labor has similarly concluded that the FLSA treatment of up-front lump sum payments requires a fact-intensive analysis. In its April 21,

1986 Opinion Letter, as discussed above, the Department noted that because "there is so much variation in the form of these bonuses", disputes are better resolved through bargaining or litigation rather than through the adoption of a universal rule. (App. at 28a, n. 2; JA at 34-36). As the Court of Appeals pointed out, that letter was written to the United Paperworkers International Union, the "parent" union of the local union that instigated the instant lawsuit. (App. at 5a).

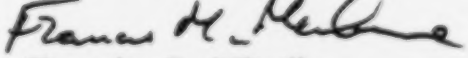
Notwithstanding the cautionary language of the Court of Appeals for the Third Circuit and the Department of Labor, and although this is a case of first impression, plaintiffs ask this Court to exercise its *certiorari* jurisdiction. They are undoubtedly aware that no other court has had an opportunity to address the issue in any factual context. It may well be that other courts will reach the same conclusion. Alternatively, courts may agree on issues of statutory interpretation, but reach different results depending upon varying factual contexts. At this juncture, therefore, the fact-specific ruling below is of interest principally to the parties, rather than the public. As this Court emphasized in *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923), "it is very important that [the Court] be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties. . . ."

CONCLUSION

Based on the specific facts of this case, the Court of Appeals correctly held that lump sum payments made to employees to induce the ratification of a collective bargaining agreement were not compensation for hours of employment, and that such payments were properly excluded from the regular rate of compensation in calculating overtime pay under the FLSA. In adopting that holding, the Court of Appeals relied on the District Court's Findings of Fact, the undisputed evidence in the record, the plain statutory language and the administrative interpretations of the pertinent statutory provisions.

This case of first impression is inappropriate for an exercise of *certiorari* jurisdiction. Not only was the decision of the Court of Appeals fundamentally sound, but it was based on the specific facts developed at trial. Plaintiffs' request for the adoption of a broad, *per se* rule is not only incorrect as a matter of law, but it is inconsistent with the admonitions of the Department of Labor that these cases must be decided individually, based on the specific factual contexts in which they are presented. Accordingly, for all of the above reasons, the Respondent employers respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that three copies of the foregoing Brief of Respondents in Opposition to Petition for Writ of Certiorari were served on counsel for Petitioners at the addresses below by United States mail, first-class postage prepaid on September 23, 1988, pursuant to Supreme Court Rule of Procedure 28.3:

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